

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

March 12, 2003

IN RE:

**SMALL TELEPHONE COMPANIES TARIFF
FILINGS REGARDING RECLASSIFICATION OF
PAY TELEPHONE SERVICE AS REQUIRED BY
FEDERAL COMMUNICATIONS COMMISSION
(FCC) DOCKET 96-128**

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**DOCKET NO.
97-01181**

ORDER SETTING PRE-HEARING CONFERENCE

This matter is before the Pre-Hearing Officer on the Supplemental Briefs of the parties.

Background

On December 6, 2002, the parties to this action were directed to brief the issue of whether 47 U.S.C. § 276, as interpreted by the Federal Communications Commission ("FCC"), is applicable to this case. After filing the briefs, the parties orally argued the issue before the panel assigned to this case at the January 6, 2003 Authority Conference. The briefs and oral arguments filed by the Coalition of Tennessee Small Local Exchange Companies ("Coalition") and the Tennessee Payphone Owners Association ("TPOA") asserted that the application of 47 U.S.C. § 276 to this case is not mandatory because the members of the Coalition are not Bell operating companies ("BOCs").¹ The brief of the Consumer Advocate and Protection Division of the Office of the Attorney General ("CAD") argued that Section 276 applied to all local exchange carriers, not

¹ The Coalition consists of the following companies: Ardmore Telephone Company, Inc., the Century Tel, Inc. Companies in Tennessee (including Century Tel of Adamsville, Inc., Century Tel of Claiborne, Inc. and Century Tel of Ooltewah-Collegedale, Inc.), Loretto Telephone Company, Inc., the TDS Telecom Companies in Tennessee ("TDS") (including Concord Telephone Exchange, Inc., Humphreys County Telephone Company, Tellico Telephone Company, Inc. and Tennessee Telephone Company), the Telephone Electronics Corp. ("TEC") Companies in Tennessee (including Crockett Telephone Company, Inc., Peoples Telephone Company, Inc. and West Tennessee Telephone Company, Inc.) and United Telephone Company, Inc.

just BOCs, and that one of the most recent FCC orders on the subject, the *Memorandum Opinion and Order* issued on January 31, 2002, in *In the Matter of Wisconsin Public Service Commission*, did not apply to Tennessee.²

At the January 27, 2003 Authority Conference, the panel unanimously found that 47 U.S.C. § 276(b)(1)(B) applies to all payphone service providers, including non-BOCs. The panel based this conclusion upon the plain language of 47 U.S.C. § 276(b)(1)(B) which states:

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 9, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that -- . . .

- (B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph A; . . .

The panel also relied upon footnote 80 of the *Memorandum Opinion and Order* issued by the FCC in *In the Matter of Wisconsin Public Service Commission*. Footnote 80 states:

Section 276(b)(1)(B) is somewhat broader than section 276(a)(1) **because it applies to all LECs [local exchange carriers] and is not limited to the BOCs**, as is section 276(a)(1). That distinction explains why Congress included a separate directive to the Commission to eliminate subsidies.³

The panel unanimously voted to direct the parties to file briefs addressing the following issues no later than February 26, 2003:

1. Whether 47 U.S.C. § 276(b)(1)(B), which applies to all local exchange carriers, requires cost-based rates?
2. Whether the previous actions of the [Tennessee Regulatory Authority] in removing subsidies have satisfied the requirements of 47 U.S.C. § 276(b)(1)(B)?

Further, to expedite the resolution of the case, the panel unanimously voted to appoint the General Counsel or his designee as Pre-Hearing Officer in this docket.

² See *In the Matter of Wisconsin Public Serv. Comm'n*, FCC 02-25 (*Memorandum Opinion and Order*) 17 F.C.C.R. 2051 (January 31, 2002) (hereinafter *Wisconsin Order*).

³ See *id.*, ¶ 34, n. 80 (emphasis added).

On February 26, the Coalition filed its Supplemental Brief as ordered. The Coalition argues that 47 U.S.C. § 276(b)(1)(B) does not require cost-based rates because the plain language of that section limits its applicability only to subsidies, not rates.⁴ The Coalition maintains that the FCC interpreted 47 U.S.C. § 276 (b)(1)(C), rather than section 276(b)(1)(B), as requiring cost-based rates for payphone line services.⁵

The Coalition further asserts that the TRA satisfied the requirements of Section 276(b)(1)(B) in its *Order Granting Intervention of the Consumer Advocate, Appointing a Pre-Hearing Officer and Approving Tariffs for Reclassification of Pay Telephones*, which approved tariff filings for members of the Coalition pending the outcome of a contested case.⁶ The Coalition argues that, pursuant to the *Order*, subsidies existing in the Carrier Common Line ("CCL") charges of the TDS Telecom Companies in Tennessee ("TDS") (including Concord Telephone Exchange, Inc., Humphreys County Telephone Company, Tellico Telephone Company, Inc. and Tennessee Telephone Company), and United Telephone Company ("United") were reduced to remove that subsidy. The Coalition further maintains that because its members also deregulated their payphone services and concurred in tariffs filed with the FCC by the National Exchange Carrier Association, Section 276(b)(1)(B) is fully satisfied.

⁴ In its reference to subsidies, the Coalition refers to elimination of payphone subsidies from carrier access charges and basic exchange and exchange access revenues.

⁵ 47 U.S.C. § 276 (b)(1)(C) states:

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that--;

- (C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a) of this section, which safeguards shall, at a minimum, include the nonstructural safeguards. . . .

⁶ See *In re: Tariff Filings By Local Exchange Companies to Comply with FCC Order 96-439, Concerning the Reclassification of Pay Telephones*, Docket No. 97-00409, *Order Granting Intervention of the Consumer Advocate, Appointing a Pre-Hearing Officer and Approving Tariffs for Reclassification of Pay Telephones* (May 2, 1997).

On February 26, 2002, the CAD filed its Supplemental Brief. The CAD argues that, while an alternative to cost-based rates may exist, in a practical sense, the use of cost-based rates is the best available means to eliminate subsidies as required under Section 276(b)(1)(B). The CAD contends that cost-based rates must be imposed to promote the goal of Section 276, the establishment of an open and competitive payphone market. The CAD notes that in the *Interim Order* issued in Docket No. 97-00409, the TRA applied a cost-based methodology to the larger LECs. The CAD argues that a consistent methodology must be applied here. Further, the CAD asserts that the FCC encouraged states to impose cost-based rates on non-BOC LECs in the *Wisconsin Order* and that both state and federal law support the imposition of cost-based rates.

The CAD argues that the TRA should act consistently with its previous actions in removing subsidies to satisfy the requirements of Section 276(b)(1)(B). The CAD maintains that the policy announced in the *Interim Order* in Docket No. 97-00409 formally adopted Section 276 and the FCC's requirements. According to the CAD, that policy consisted of determinations that (1) the rates adopted by the TRA apply to all providers of payphone service; (2) rates must be cost-based, non-discriminatory and consistent with Section 276 and Tenn. Code Ann. § 65-5-208(c); (3) payphone rates should include a monthly flat rate component and a usage rate component; and (4) the New Services test is the proper methodology for calculating cost-based rates. The CAD notes that three of the four companies to which this policy was applied were non-BOC LECs.

The TPOA adopted the CAD's Supplemental Brief in its entirety.

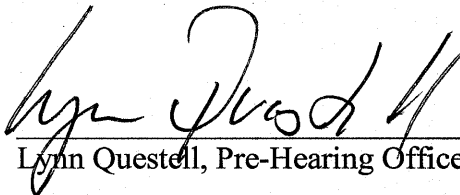
Having read and considered the parties' Supplemental Briefs, the Pre-Hearing Officer will provide the parties with the opportunity to file responses thereto. Written responses, if any, shall be filed **no later than Thursday, March 20, 2003.**

The Pre-Hearing Officer will hold a Pre-Hearing Conference on **Tuesday, March 25, 2003 at 1:30 p.m.** The parties shall be prepared to (1) discuss the status of the case; (2) orally respond to the arguments raised in the Supplemental Briefs; and (3) discuss proposals that, in the absence of cost studies, could result in the adoption of a basis for certifying⁷ that all intrastate and interstate payphone subsidies from basic exchange and exchange access revenue have been removed.

The Pre-Hearing Conference will be held in the ground floor Hearing Room at 460 James Robertson Parkway, Nashville, Tennessee. Participants with disabilities who require special accommodations or alternate communications formats should contact the Tennessee Regulatory Authority ADA-EEO/AA Coordinator/Officer, 460 James Robertson Parkway, Nashville, Tennessee 37243-0505 or 1-800-342-8359 so that reasonable accommodations can be made.

IT IS THEREFORE ORDERED THAT:

1. Written responses to the Supplemental Briefs may be filed **no later than Thursday, March 20, 2003.**
2. A Pre-Hearing Conference will be held on **Tuesday, March 25, 2003 at 1:30 p.m.**


Lynn Questell, Pre-Hearing Officer

⁷ See *Black's Law Dictionary*, 207 (5th ed. 1979) ("To authenticate or vouch for a thing in writing. To attest as being true or as represented.").